

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In Re ) Fair Hearing Nos. 12,265 ) & 12,296

Appeal of )

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### INTRODUCTION

The petitioners in these cases appeal the decisions by the Department of Social Welfare terminating their ANFC benefits. The issue is whether the petitioners have or had an "eligible child" in their "home" within the meaning of the pertinent regulations at any time during the period in which their children have been removed from their homes pending juvenile court "CHINS" proceedings. Because the legal issues in these cases are deemed to be identical, the cases have been consolidated for the Board's consideration.

### FINDINGS OF FACT

The facts are not in dispute in either case. In Fair Hearing No. 12,265, the petitioner's two young children were taken into protective custody by the Department of Social and Rehabilitation Services (SRS) on or about July 28, 1993, following the hospitalization of one of the children for injuries allegedly inflicted by the child's father, the petitioner's boyfriend. On that day an "emergency order" was obtained from the juvenile court allowing temporary care of the children by SRS pending a "detention hearing".

The detention hearing was held on July 30, 1993, after which the juvenile court issued a "Detention Order" that (on a judicial form) included the following:

-Legal custody of the child is hereby transferred to the Commissioner of Social and Rehabilitation Services until further order of the Court

-The child shall be detained, until further hearing on this matter, at:

A place to be determined by the Commissioner...

SRS then immediately placed one child in a foster care home. The other child was placed in foster care

when he got out of the hospital. On September 6, 1993, the juvenile court entered a "Judicial Determination" that under the circumstances SRS's efforts regarding "services" to the children's family were "reasonable".

The "merits hearing" was not held until October 6, 1993. At that time the juvenile court found the children to be CHINS and ordered their continuing care and legal custody with SRS. A "disposition hearing" in the matter was held on December 8, 1993, at which time legal custody of the children was again placed with SRS.

Shortly after the detention hearing on July 30, 1993, SRS notified the Department that it had authorized "foster care maintenance payments" (ANFC-FC) on behalf of the children. Apparently based on this information, the Department, by notice dated August 8, 1993, terminated the petitioner's ANFC benefits effective September 1, 1993.

In the second case, Fair Hearing No. 12,296, the petitioner and his wife are both disabled and receive SSI benefits. The petitioner's wife gave birth to a child on August 25, 1993. The next day, however, while she and the baby were still in the hospital, SRS obtained a "Detention Order" from the juvenile court transferring legal custody of the child to SRS; and the child was removed from the hospital and placed in foster care. On that same date the juvenile court entered a "Judicial Determination" that under the circumstances SRS's efforts regarding services to the family were "reasonable".

The petitioner applied for ANFC for the child on August 30, 1993.<sup>(1)</sup> Although the child was in SRS custody at that time the petitioner stated on the application that the child was in his and his wife's home. It appears that the application was granted almost immediately, and that the Department began making ANFC payments to the petitioner for the child as of that date. A few days later, however, the Department learned that SRS had placed the child in foster care, and it sent the petitioner a notice stating that ANFC

for the child would close as of October 1, 1993, because the child was not living in the home.

To date, no "merits hearing" has yet been held; although one was scheduled for October 25, 1993, but then continued. The delay in holding the merits hearing has

apparently been caused by the need for guardians ad litem to be appointed for the petitioner and his wife.

### ORDER

The Department's decisions are affirmed.

### REASONS

These appeals compel the Board to revisit the issues raised in Fair Hearing No. 10,999, decided by the Board on May 25, 1993. A reexamination of the Vermont CHINS procedures and the federal and state ANFC statutes and regulations persuades the Board that the decision in Fair Hearing No. 10,999 was based on an incomplete and, in crucial respects, inaccurate assessment of how the juvenile courts interpret and apply the CHINS statutes, and how the Vermont CHINS procedures relate to a family's

eligibility for ANFC.

The ANFC regulations generally require an "eligible parent" to live in the same "home", "household", or "residence" as an "eligible child". W.A.M. §§ 2242.2 and 2302.1. W.A.M. § 2302.12 defines "home" as follows:

A "home" is defined as the family setting maintained, or in process of being established, in which the relative assumes responsibility for care and supervision of the child(ren). However, lack of a physical home (i.e. customary family setting), as in the case of a homeless family is not by itself a basis for disqualification (denial or termination) from eligibility for assistance.

The child(ren) and relative normally share the same household. A "home" shall be considered to exist, however, as long as the relative is responsible for care and control of the child(ren) during temporary absence of either from the customary family setting.

Also relevant is W.A.M. § 2224, which defines "family separation" as follows:

A recipient of ANFC assistance, or an individual acting on behalf of a caretaker relative unable to do so, shall notify the district director of any physical separation of relative and child(ren) which continues or is expected to continue for 30 days or more. Eligibility shall continue when the following conditions are met:

1. The recipient relative or, in cases of subsequent separation of parents receiving assistance as a two parent family, the other recipient parent continues or supervises continuing care and supervision of eligible child(ren)
2. A home is maintained for the child(ren) or for return of the relative within six months;
3. Eligible family members have continuing financial need. . .

The crucial language in the above regulations, at least insofar as these cases are concerned, are the phrases "is responsible for the care and control of the child(ren) during temporary absence of either from the customary family setting" and "continues or supervises continuing care and supervision of eligible child(ren)." If it could be concluded that the petitioners in these cases, following the "Detention Orders" that were entered by the juvenile court regarding their children, continued to have the "responsibility" for or the right to "supervise" the care and control of their children, it must be concluded that they remained eligible for ANFC under the above regulations. See Johnson v. Comm. of Pub. Welfare, 414 Mass. 572 (1993). However, if their custodial rights of "supervision" and "responsibility for the care and control of the children" were, in effect, terminated, it must be concluded that once the children were taken from their homes the petitioners were no longer eligible for ANFC.

Also to be considered in any determination of "temporary absence" for ANFC purposes are other provisions in the statutes and regulations that children in "foster care" are also eligible for ANFC, and a federal statute and regulation prohibiting states from paying ANFC benefits to more than one household at the same time for the same child. See 42 U.S.C. § 609(a) and 45 C.F.R. § 233.90(c)(1). Under a federal AFDC statute, 42 U.S.C. § 672(a), SRS is authorized to make "foster care maintenance payments" for ANFC-eligible children when the following conditions are met:

(1) the removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 671(a)(15) of this title have been made;

(2) such child's placement and care are the responsibility of (A) the state agency administering the State plan approved under section 671 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 671 of this title has made an agreement which is still in effect;

(3) such child has been placed in a foster family home or child-care institution as a result of a voluntary placement agreement or judicial determination referred to in paragraph (1)...

(See also, 45 C.F.R. § 233.110[a] and W.A.M. § 2248.) Section 671(a)(15) of Title 42, referred to in paragraph (1), above, provides, in pertinent part:

. . .reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . .

The Department maintains that at the point that SRS "authorizes foster care payments" for children, those children cannot be considered "temporarily absent" from their parents' home, and the parents of those children (like the petitioners herein) become ineligible for "duplicative" ANFC payments in those children's behalf. Based on the juvenile court's actions in these matters, the Board is constrained to conclude that the Department's position is correct.

In Vermont, the CHINS process begins when a law enforcement officer (usually working in concert with SRS) takes a child into "custody" (pursuant to 33 V.S.A. § 5510). The officer (or SRS) must then immediately petition the juvenile court for an order of "detention or placement in shelter care". *Id.* §§ 5511(2) and 5513. Although the statutes define both "detention" and "shelter" as "temporary care...pending court disposition" (33 V.S.A. §§ 5502[a][5] and [17]), 33 V.S.A. § 5514(a), further defines "temporary shelter care or detention" as follows:

(a) A child taken into custody under section 5510 of this title and not immediately released to his parents, guardian or custodian, or delivered to a designated shelter, shall be by order of the court provided temporary shelter care or detention prior to a detention hearing on a petition held under this chapter or a hearing before a probate or other court upon a transfer thereto under section 5529(b) of this title in one or more of the following places;

(1) The home of his parents, guardian, custodian, or other suitable person designated by the court, upon their undertaking to bring the child before the court at the detention hearing,

(2) A licensed foster home or a home approved by the court,

(3) A facility operated by a licensed child caring agency,

(4) A detention home or center for delinquent children which is under the direction or supervision of or

approved by the department of social and rehabilitation services, or

(5) In the event that the child has been or will be or may be transferred under section 5529(b) of this title, in any other suitable place designated by the court; or shall transfer legal custody of the child to the commissioner of social and rehabilitation services, if the court believes the child may be found delinquent,

if the court believes the child may be found in need of care or supervision, pending such detention or other hearing.

(Emphasis added, see infra.)

Following the issuance of one of the above "emergency orders" a "detention hearing" must then be held within forty-eight hours to determine whether "the continued detention of the child would be to his best interests and welfare". 33 V.S.A. § 5515(a). After a detention hearing, if circumstances warrant, the juvenile court may "order the continued detention or custody of the child pending the full ("merits") hearing under section 5519 of this title". Id. § 5515(d). Reading, as one must, this section and § 5514(a), supra, in para materia, it can only be concluded that "continued detention or custody" refers to the same "temporary shelter care or detention" placement options set forth in § 5514(a).

The Board is concerned that both the "plain meaning" of the above-emphasized portion of § 5514(a)(5) and the context in which it appears would seem to limit a "transfer (of) legal custody" to SRS at these stages of the proceedings to only those situations (not present in the instant cases) in which the juvenile court believes the child may be found both CHINS and "delinquent".<sup>(2)</sup> As noted above, however, the "Detention Orders" issued by the juvenile court in these cases clearly provided for the "transfer of legal custody" to SRS. Moreover, SRS maintained in oral argument before the Board that such "transfers of legal custody" to SRS at the detention phase of the CHINS process are the rule rather than the exception in such cases.

"Legal custody" is specifically defined in the CHINS statutes, at 33 V.S.A. § 5502(a)(10), as follows:

"Legal custody" means the legal status created by order of the juvenile court under the authority of this chapter which invests in a party to a proceeding under this chapter or another person, which party or person may also be the guardian of the person of the minor, the right to have the physical possession of a minor and to determine where and with whom he shall live, the authority to consent to major medical, psychiatric, and surgical treatment, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to the powers, rights, duties and responsibilities of the guardian of the person of the minor and subject to any residual parental rights and responsibilities.

In light of the above (but contrary to the Board's conclusion in Fair Hearing No. 10,999), it appears that as far as the juvenile court is concerned the petitioners' parental "responsibility" for and "supervision" of the children effectively ceased at the point that the Detention Orders in these matters "transferred legal custody" of the children to SRS. Moreover, the juvenile court entered a concurrent "Judicial Determination" in both cases at that time SRS met the federal requirements (supra) to authorize foster care maintenance payments on behalf of those children.

33 V.S.A. § 5503(b) provides as follows:

The orders of the juvenile court under authority of this chapter shall take precedence over any order of any other court of this state...to the extent inconsistent therewith.

The Board appears to be effectively bound by the juvenile court's orders in these matters. It must, therefore, be concluded that at the point that "legal custody", as it is defined in the CHINS statutes, was "transferred" by the juvenile court from the petitioners to SRS, and SRS then placed the children in foster care, the petitioners in these cases were no longer eligible for ANFC based on both the definition of "temporary absence" under the state and federal regulations and the prohibition in the federal statute and regulations on concurrent dual payments of ANFC for the same children. See Indiana Dept. of Public Welfare v. Hupp, No. 60A01-9206-CV-174 (Ind. Ct. App., December 29, 1992). Accordingly, the Department's decisions are affirmed. <sup>(3)</sup>

1. Because the petitioner and his wife are both SSI recipients, any ANFC grant would include only the needs of the child.
2. Although the second dependent clause of § 5514(a)(5) (emphasized above) is grammatically imprecise, given the fact that this provision otherwise refers only to "delinquency" situations, it seems strained to read the dependent clauses beginning with the word "if" as being disjunctive rather than as setting out cumulative conditions which must be met before "legal custody" can be transferred to SRS.
3. This result is troubling because it is not until a "merits hearing" has been held that the juvenile court is even empowered to make a finding of CHINS. See 33 V.S.A. § 5526(a). At the merits hearing, if the child is found to be CHINS, the court is required to continue the hearing "for the purpose of then considering the disposition to be made in the proceedings." Id. § 5526(b). This "disposition hearing" is required to be held within thirty days (id. § 5526[b]), but may be further continued if necessary (id. § 5527[e]). Prior to the disposition hearing SRS is required to file a "disposition report" with the juvenile court assessing the child's needs, resources, and goals of treatment, and to make a "recommendation" to the court in the form of a "case plan" for the child. Id. § 5527. Then, 33 V.S.A. § 5528(a) provides that the court's "disposition order" can be any of the following:
  - (1) Permit the child to remain with his parents, guardian or custodian, subject to such conditions and limitations as the court may prescribe,
  - (2) Place the child under protective supervision,
  - (3) Transfer legal custody, or guardianship over the person, or residual parental rights and responsibilities, to any of the following:
    - (A) The commissioner of social and rehabilitation services, who may place the child under his supervision and authority in a family home, a treatment, rehabilitative or educational institution or facility, including the Weeks school, or a hospital, as the commissioner may determine in his judgment to be in the best interests of the child...

(Emphasis added.)

Other than the reference in 33 V.S.A. § 5514(a)(5), discussed supra, the above provision under "disposition" is the only place in the CHINS statutes that allows the juvenile court to "transfer legal custody" of children to SRS.

Regardless of one's interpretation of § 5514(a)(5), however, it is doubtful that the juvenile courts are at all cognizant of the fact that the transfer of legal custody to SRS at the detention phase of the CHINS process has the legal effect of immediately terminating the parents' eligibility for ANFC--thus diminishing the parents' ability to maintain a home for that child to return to, especially when, as here, the CHINS proceedings become protracted. In the board's view, such a "hair trigger" loss of the parents' legal custody--and, as a result, their ANFC--prior to any adjudication on the "merits" of their case, and before a "final adjudication" that their children's removal from their home is necessary, appears to be contrary not only to the letter and spirit of the CHINS statutes (and, arguably, to due process), but also to SRS's duty under the federal foster care statutes, supra, to make "reasonable efforts ...to make it possible for the child to return to his home". See Kramer v. New Mexico Human Services Dept., N.M. App. No. 12,725 (1992) and Morin v. Commissioner of Public Welfare, 448 NE 1287 (Mass. App. 1983).

In its oral arguments before the board, SRS maintained (correctly in the board's view) that its authority to obtain necessary federally-funded foster care maintenance payments for CHINS children depends not only on SRS having legal custody of the children in question, but also on those children's parents being ineligible for continuing ANFC benefits for those children. This begs the question, however, of the parents' statutory and due process rights during the CHINS proceedings. In the board's view, this is a dilemma that SRS has the duty to bring to the juvenile courts', if not the legislature's, immediate attention.